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No. 85-1773

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES M. OBERLY, III AND JOHN E. WILSON, III,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLANTS' BRIEF IN REPLY TO MOTION TO AFFIRM

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ARGUMENT

I. DELAWARE DOES NOT SEEK TO REGULATE RAILYARD NOISE REGULATED BY THE ENVIRONMENTAL PROTECTION AGENCY.

Federal standards regulate only six sources of railroad noise. All the regulated sources are typically associated with railroad operations. As such, the noise from these sources reasonably can be expected to occur

throughout the nation. It makes sense, then, that uniform federal standards immunize railroads from potentially diverse state regulations.

However, Delaware does not seek to regulate noise from any of those six sources. The incessant noise from parked refrigerated truck trailers has tenuous ties to typical railroad noise. Noise from these trailers becomes an environmental problem when railroads operating a "piggyback" terminal locate the parking lot for refrigerated trailers adjacent to an existing residential community. Federal regulations erect no barrier around the noise from this parking lot. If Congress' language in 42 U.S.C. §4916(c) is to be given any effect, then states may regulate railroad noise emissions for which the Environmental Protection Agency ("EPA") has established no standard.

The Baltimore & Ohio Railroad, the Baltimore & Philadelphia Railroad, Mount Clare Properties (Delaware), Inc., and the Chessie Motor Express ("the Chessie group") offer a two-pronged response to this argument. First, they say that the EPA's decision not to regulate noise from parked refrigerated trailers constituted an authoritative determination that the area is best left unregulated. Alternatively, they argue that the EPA effectively "regulated noise emissions from all railroad equipment and facilities" by enacting standards which limited the major sources of noise from railyards. Appellees' Motion To Affirm 10 - 11. The first response defies the language of 42 U.S.C. §4916(c); the second defies logic.

Both responses ignore the language of 42 U.S.C. §4916(c). The Chessie group's failure to discuss what Congress said about the extent of preemption is fatal to the group's motion to affirm. The intent of Congress is conclusive concerning the nature and extent of preemption. *Brown v. Hotel and Restaurant Employees and Bartenders*, 104 S.Ct. 3179 (1984).

A. Why The *Atlantic Richfield* Holding Is Inapplicable Here.

The first prong of the Chessie group's argument rests entirely on a portion of this Court's holding in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)(discussing the Ports and Waterways Safety Act of 1972). The Court acknowledged that a federal regulation in a particular field may preempt state law when the federal regulator's decision "takes on the character" that the state law approach was inappropriate. 435 U.S. at 178. This rule was expanded in *Arkansas Electric Cooperative Corp. v. Arkansas Public Commission*, 461 U.S. 375 (1983)(discussing the Federal Power Act and the Rural Electrification Act). The Court referred to the precept that preemption could result from a federal "determination that the area is best left unregulated." 461 U.S. at 384.

The language of 42 U.S.C. §4916(c), however, renders this line of authority inapplicable. In that section, Congress delineated the scope of federal preemption which applies to the Federal Noise Control Act.

Congress stated that preemption occurs "after the effective date of [an EPA] regulation." 42 U.S.C. §4916(c)(1). A decision not to regulate lacks an effective date. Thus the EPA's decision to withdraw standards governing standing refrigerator cars never met the threshold requirement of the statute and never triggered its preemption clause. See 47 Fed.Reg. 54107-54108.

The next condition, which Congress imposed, precludes states from regulating "noise emissions resulting from the operation of the *same equipment and facility*" for which there is an "applicable" federal regulation. 42 U.S.C. §4916(c)(1). Congress was specifically aware that this was the nature of the preemption clause of the statute. During floor debates, Senator Tunney stated, "[P]reemption . . . only occurs in areas of regulation where adequate Federal regulations are in effect." 118

Cong.Rec. 37318 (1972), *reprinted in*, A Legislative History of the Noise Control Act of 1972 at 40 (1974). Clearly the EPA's decision to withdraw a refrigerator car standard created no "applicable" regulation as to refrigerated trailers. Once again, the statutory prerequisites to confer preemptive effect on federal regulatory efforts were not met.

Even if one could ignore the statutory language as the Chessie group does, the peculiar regulatory history of EPA's decision to withdraw refrigerator car standards does not bring this case within the rule of *Atlantic Richfield*. The history discloses that the proposed regulations governing refrigerator cars were not designed to address the noise from refrigerated truck trailers.[1] Indeed, the EPA decided to withdraw a standard applicable to refrigerator cars because the use of such cars was declining. 45 Fed.Reg. 1258. Operations using refrigerated trailers were displacing the use of refrigerator cars. *Id.* The EPA acknowledged that it had not considered the noise which Delaware seeks to regulate: refrigerator units on truck trailers and containers used in TOFC-/COFC operations "were not addressed by EPA in the proposed rules." *Id.*, col. 2.

The EPA did address the general noise from TOFC-/COFC operations and promulgated no standard for noise from such operations. Presumably, the EPA considered regulating TOFC/COFC noise through a property line standard.[2] A-9. To be sure, the Status Report in

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1. Refrigerator cars are railcars equipped with refrigeration units. Refrigerated truck trailers are truck trailers on which refrigeration units have been mounted. The location of refrigerator cars within a railyard is limited by the placement of the rails. In contrast, refrigerated truck trailers can be lifted from flat cars and driven to any location.

2. Delaware's intent to regulate noise from parked refrigerated trailers does not result in the imposition of a property line standard. A property line standard would encompass all the sound from a particular facility as measured from the property line of that facility. See

Association of American Railroads v. Costle, 562 F.2d 1310 (D.C.Cir. 1977) as well as the published EPA comments suggest that property line standards were deemed unnecessary because existing standards covered the major sources of railyard noise.[3] But there are two reasons why this justification says nothing about regulating offloaded, parked refrigerated truck trailers.

First, noise from TOFC/COFC operations includes more than refrigerated unit noise. See Jurisdictional Statement at 3 - 4. The noise source, among those considered by the EPA, which is most analogous to refrigerated trailer noise is noise from stationary refrigerator cars. And, as noted, the EPA withdrew the standard for that noise for reasons unassociated with the desirability of regulation.

Second, in withdrawing the property line standard, the EPA did not express the belief that the area of refrigerated truck trailer noise was best left unregulated. As a result, *Atlantic Richfield* type preemption is inapplicable given this statutory and regulatory history.

B. Regulating Some Of The Parts Is Not Equivalent To Regulating The Sum Of The Parts.

The second prong of the Chessie group's argument relies on the justification offered by the EPA and the Association of American Railroads for the withdrawal of the

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44 Fed.Reg. 22961. Although Delaware proposes to enforce its regulations by measuring noise levels from neighboring property, only one source of noise emissions will be targetted: parked refrigerated trailers. The EPA condones similar property line measurements for other sources. See 40 C.F.R. §201.11(c), §201.12(c)(noise from stationary switchers can be measured from neighboring property).

3. History supports the inference that the EPA was motivated to withdraw the refrigerated trailer standard by the willingness of the Association of American Railroads to settle its lawsuit. This point is argued in the Jurisdictional Statement at page 12 and will not be restated here.

property line standard. In summary, property line standards were deemed unnecessary because "the cumulative effect of regulating [railyard] equipment" limits the total level of noise emissions from the railyard. Appellees' Motion To Affirm at 7, 11 - 12. Given the extent of federal regulation, this reasoning defies logic.

Federal standards govern noise from stationary locomotives and switchers, 40 C.F.R. §201.11; moving locomotives and switchers, 40 C.F.R. §201.12; moving rail cars, 40 C.F.R. §201.13; retarder operations, 40 C.F.R. §201.14; car coupling operations, 40 C.F.R. §201.15; and locomotive load cell test stands, 40 C.F.R. §201.16. But these are only a small part of the sources of noise in a railyard. The EPA recognized numerous other sources of noise when it first considered promulgating regulations. That agency listed horns, bells, whistles, and other warning devices as sources of railroad noise. 39 Fed.Reg. 24582. Snow plows, track laying equipment, cranes, and other special purpose railroad equipment also emit noise. *Id.*

Like the noise from refrigerated trailers, no federal standard limits these sources individually. And, as a result, the existing federal standards are ineffective in limiting the total noise level to which these unregulated sources contribute. An effective ceiling on the total noise level can be achieved either by setting a property line standard or by enacting individual standards for each and every source of noise within the railyard. Having rejected the property line standard and having enacted standards for six sources of railroad noise emissions, the EPA regulated only a part of the noise coming from railyards. The total noise level remains unchecked.

II. FEDERALISM SUFFERS FROM UNCERTAINTY OVER FEDERAL INVOLVEMENT IN A STATE'S REGULATORY PROCESSES

The Chessie group's suggestion that 42 U.S.C §4916(c)(2) eliminates any threat to federalism misses the point. The appellants' discussion transcended an application to railroad noise. The threat comes from fashioning a rule of preemption which ties a state's regulatory hands every time a federal agency decided, for whatever reason, not to enact a federal standard. That is the precise rule the lower courts applied in this case.

Nevertheless, the Chessie group's reading of 42 U.S.C. §4916(c)(2) would chill the independent exercise of a state's regulatory power. That section permits a state to enforce its railroad noise emission standards against a federally regulated source. The state may do so, however, only if two federal officials can be persuaded that enforcement of the state standard is "necessitated by special local conditions." 42 U.S.C. §4916(c)(2). Rather than eliminating the threat to federalism, this provision embraces it.

If the Chessie group's and the lower courts' view is permitted to stand, state regulation of a specific source of railroad noise will be preempted if the EPA considered, but failed to enact, a standard governing that source. It is relatively simple for a state regulator to determine what regulations the EPA has enacted. A more difficult task is to ascertain those that the EPA failed to enact. Absent a clear decision by a federal regulator that neither state nor federal regulations are needed, state regulators are left to guess as to what, if anything, they may regulate.

In this case, the Chessie group has stated that the EPA believes it has regulated "noise emissions from all railroad equipment and facilities." Appellees' Motion to Affirm at 10 - 11. Presumably, then, no state regulator can seek to enforce a state standard governing any noise

emitted from a railroad facility unless it seeks the approval of federal officials. Such an interpretation swallows in its entirety the state sovereignty component of federalism.

For this reason, the appellants' reading of §4916(c)(2) makes more practical sense. It is also more consistent with the language of §4916(c)(1). Appellants submit that the provisions of §4916(c)(2) are triggered only when a state wishes to regulate a source of railroad noise for which an applicable federal regulation exists. The ease of locating existing federal regulations serves as reassurance to state regulators that the standard they propose will be constitutional. Moreover, a literal reading of §4916(c)(1) indicates that the state is preempted from regulating only federally regulated sources.

Contrary to the intent of Congress, states across the nation are left powerless to protect their citizens from noise whenever the source happens to be located within the confines of railyard. This Court must eliminate this result by either giving effect to the express intent of Congress or correcting the misapplication of *Atlantic Richfield*.

CONCLUSION

For all of the foregoing reasons, the State officials respectfully ask this Court to summarily reverse or grant plenary consideration of the question presented by this appeal.

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